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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 703

SKOKOMISH INDIAN TRIBE, a corporation, *Petitioner*,
vs.
E. L. FRANCE, *et al.*, *Respondents*.

BRIEF IN OPPOSITION TO CERTIORARI

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INDEX

	Page
Counter-Statement of the Case	1
Objections to Reasons No. 1 and 2	5
Objections to Reason No. 3	7
Objections to Reason No. 4	8
Aboriginal Title	9
Conclusion	13

TABLE OF CASES

Choctaw Nation v. United States, 318 U.S. 423, 63 S.Ct. 672, 87 L.ed. 877 (1943)	7
Cowlitz Ind. Tribe v. Tacoma (C.A. 9, 1957) 253 F. 2d 625	11
Duwamish Indians v. United States, 79 Ct. Cls. 530 (cert. den. 295 U.S. 755 (1934)	12
Shoshone Indians v. United States, 234 U.S. 335, 65 S.Ct. 690, 89 L.ed. 985 (1945)	7
State v. Towessnute (1916) 89 Wash. 478, 154 Pac. 805	9
United States v. Santa Fe Pac. R. Co. (1914) 314 U.S. 339, 86 L.ed. 260	11
Tee-Hit-Ton Indians v. United States (1955) 348 U.S. 272, 99 L.ed. 314 (on review of 128 Ct. Cls.	
Worcester v. Georgia, 6 Pet. 515	7

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BRIEF IN OPPOSITION TO CERTIORARI

Respondents Carlson, Strine, Greeley, Macke and Phillips oppose the issuance of a writ of certiorari herein. The decision below is not one properly reviewable under any considerations expressed in Rule 19, nor the practices of the court, nor is this a case in which such relief is needful or appropriate.

This case involved a factual controversy and has been disposed of below on findings of fact which petitioner prefers to ignore.

COUNTER STATEMENT OF THE CASE

We regard petitioner's statement of the case as inadequate and actually embracing matters outside the record.

We have none of the record as now constituted available to us nor any knowledge of its paging. Hence, all references here are to the Transcript of Record as we understood it was filed with the Court of Appeals, and to the exhibits as they were marked in the District Court. Exhibit numbers with a prefix "A" signify exhibits offered by defendants below.

This action was brought by an incorporated Indian Tribe (Tr. 6) constituted under an Act of Congress with power to sue and be sued. Ex. 1; Art. 5(i). The action was not brought by Indians as such nor by any aboriginal group nor by incompetents. The corporation instituted and maintained this action in its own name for its own account.

It is erroneous to suggest in the caption or in the petition that this proceeding involves any petitioner other than the corporation.

This action was brought to quiet title (Tr. 23) to a narrow strip of "tidal land" (Fdg. 21; Tr. 93) which is alternately submerged and exposed with each turn of the tide twice a day and has been from time immemorial.

The strip is of no value except to the abutting upland owners as a means of access to navigable water. The upland ownership by respondents is not in question. The tidal strip is bordered on the land side by the private property of respondents and on the water side by public navigable water. If the strip were not owned by respondents it would be only a basis for extortion against respondent upland owners. Petitioner owns none of the abutting uplands and would have no access to the strip except via the water, and then only if the tide was out. Fdgs. 9, 10, 11; Tr. 91.

The theory of petitioner's action was that the legal description of the land formerly comprising the Indian reservation as set forth in the Executive Order creating the reservation (Ex. 4) expressly included the tidal strip and hence the title to the strip should be quieted in

the incorporated petitioner as some form of successor to the original tribes which were settled upon the reservation pursuant to the Executive Order. Neither the Treaty (Ex. 3) nor the Executive Order included the tidal strip in the reservation. Fdgs. 2, 3, 4, 7, 23, 24; Tr. 89. The exact exterior boundaries of the reservation were surveyed, marked out, and documented in 1862 as the 1855 Treaty stated would be done. Fdgs. 4, 33, 34; Ex. A-14-1, attachment "B"; Also Ex. A-9, 6, 45. The abutting uplands have long since been regularly disposed of by Indian allottees and there is no Indian or reservation land along any of the waterfront. Fdgs. 9, 10, 11; Tr. 91.

This action does not and never has involved "fishing rights." The Treaty relied upon by petitioner in Article 4 thereof says:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . .".

No one has challenged any rights of Indians to exercise any privileges granted by Article 4 of the Treaty. No issue in this case involves that consideration. This is solely an action to try title to a submerged tidal strip.

This is not a case involving "shellfish beds." The strip of submerged land abutting respondents' upland is a narrow, rocky, gravelly strip (Fdg. 21; Tr. 93; Ex. A-3-7) and not a source of shellfish in usable quantities. Fdgs. 20, 22, 31.

This case has never involved North Pacific Coast, Alaska, or other Indians.

Petitioner being unable to establish the tidal strip to be within the limits of the described and established reservation area sought to have the trial court speculate and infer that perhaps the tidal strip had contained sufficient edible shellfish in 1855 or 1874 to have constituted a necessary part of the subsistence and economy of the aboriginal Indians and hence should have been indispensably an appurtenance of the reservation. An issue of fact on this proposition was made at the beginning of this action and maintained throughout. See particularly the Pretrial Order No. 16008—Tr. 85, 86, 97, 99. The issue was not only whether this tidal strip could or ever did contain usable quantities of shellfish, but also whether these or any Indians ever were dependent upon or derived material subsistence therefrom. The trial court after hearing a wide range of testimony and evidence, including all the hearsay that petitioner could muster, expressly found against such contention of petitioner. Fdgs. 14-20; Tr. 92-93. In Finding 16, Tr. 92, line 23, please correct the exhibit number to 62, rather than A-62. This tidal strip has never been and is not now a source of shellfish in usable quantities. Fdgs. 20, 21; Tr. 93; Fdg. 31; Tr. 95. The nature of this particular locale of low salinity (Fdg. 22; Tr. 92) explains why shellfish and marine life of interest to Indians were found several miles distant from this tidal strip. Fdg. 19; Tr. 93; Ex. A-62. Thus this issue could not blithely be disposed of by conjuring up "judicial knowledge" that Indians were known to eat fish.

The respondents on whose behalf this brief is sub-

mitted are concerned only with the tidal strip along the northerly $^5/_8$ of a mile, approximately, of the former reservation in Section 26. In Section 26 the tidal strip is specially narrow, rocky and gravelly. Fdgs. 20, 21; Tr. 93; Ex. A-3-7.

The main highway, U.S. 101, skirts the Hood Canal area and traverses the Indian Reservation. Ex. A-48, A-62. All the land in Section 26 between the highway and the waters of Hood Canal have long also been legally allotted to Indians and legally conveyed by them with government approval to and vested in respondents and their predecessors in title. Fdgs. 9, 10, 11; Tr. 91.

Section 26 with which these respondents are concerned also has a separate interesting and pertinent history showing its inclusion in the reservation only by separate and later proceedings. It was purchased by the government from a homesteader Fisher pursuant to a special Congressional appropriation for addition to the reservation, and was not carved out of the public domain, as was the balance of the reservation. Fdg. 5; Tr. 90; Fdg. 23; Tr. 93-4; Ex. A-14-1, A-14-2, A-14-3 and A-14-4.

OBJECTIONS TO REASONS NO. 1 AND 2

Respondents object to petitioner's so-called Reasons No. 1 and 2 for the issuance of the writ. These seem to be grounded upon a supposed "intention" of the negotators of the Treaty. The Court of Appeals disposed of this contention in part by quoting a memorandum decision of the trial court of January 22, 1962 (R. 222)

which quotation in the Court of Appeals opinion appears at page 29 of the pending petition.

The factual issue as to intention was tried out at length and resulted in Findings 5, 7, 34 and 24 that nothing in any records or information leading to the establishment of the reservation reflected any intention to include the submerged tidal strip in this particular reservation.

Appendix "D" to the pending petition is an invention of petitioner and not a part of the record herein. The only exhibit dealing with this subject matter is Exhibit A-1 consisting of portions of a government publication entitled "Executive Orders Relating to Indian Reservations from May 14, 1855 to July 1, 1912," showing that in the several treaties negotiated at approximately the same time in Washington Territory there was express language referring boundaries to low water when so intended. Fdg. 6. It would be unwarranted speculation to accept petitioner's suggestion at page 46 that the omission of such words in this particular Executive Order was "inadvertent error on the part of a clerk in Washington." The proof in the present case showed the extreme care and extended consideration given to surveying, defining and describing the actual reservation limits by responsible personnel upon the ground actually then operating the *de facto* reservation, who submitted the required description to Washington, D.C. for the more formal declaration finally expressed in the Executive Order. Fdg. 5; Tr. 90; Fdg. 23; Tr. 93-4; Ex. A-14-1, A-14-2, A-14-3, A-14-4.

Nothing in the present case clouds the title to any

other tidelands anywhere, particularly not that of North Pacific Coast or Alaska tribes.

There is no conflict in the decisions below with prior decisions of this court or of any other Court of Appeals.

OBJECTIONS TO REASON NO. 3

The decision below is not judicial legislation nor does it depend on rules of construction conflicting with any rules of this court.

The most liberal rules of construction will not support petitioner's claim. As noted in *Choctaw Nation v. United States*, 318 U.S. 423, 431 2, 63 S.Ct. 672, 87 L.Ed. 877 (1943), upon which petitioner relies and from which the Court of Appeals quoted (see page 20 of the pending petition):

> "... *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*"

The usually quoted *Worcester v. Georgia*, 6 Pet. 515 language is also limited as held in *Shoshone Indians v. United States*, 234 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985 (1945), also quoted by the Court of Appeals (see page 21 of the pending petition) as follows:

> "... We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

Here petitioner has its actual claim pending before the Indian Claims Commission, Ex. 62.

OBJECTIONS TO REASON NO. 4

Petitioner notes the Treaty specified a reservation to be "surveyed and marked out." That is literally what occurred several years later. Fdgs. 4, 5; Tr. 90; Fdg. 9, 10; Tr. 91; Ex. A-14-1, A-9, 6, 45.

The idea that this tideland strip should be included in any reservation nowhere appears in the evidence. Fdgs. 34, 24.

Petitioner's contention that ninety per cent of the sustenance of these Indians was from the property is completely contrary to the findings of the court. Fdgs. 14-22, inclusive, and 31; Tr. 92, 93.

Petitioner's further contention that the Treaty expressly recognized and contemplated and provided for the use of this particular tideland strip is sheer imagination. The Indians protected by this Treaty had their ancient fishing rights fully recognized in the Treaty but not tied to any particular geographic point (unless an accustomed ground or fishing station) and certainly not by the grant of fee title to any location. As noted in Findings 13 to 22, these Indians were river people. They had all of the Skokomish River forming a substantial margin of the reservation, a most valuable fishery, and they proceeded from that river to many places both near and far from the river and from the reservation and found according to season most prolific and useful sources of fish at areas remote from this particularly unrewarding beach.

ABORIGINAL TITLE

Plaintiff apparently would have the court find that the Indians had some form of "Indian title" or aboriginal title which they reserved and retained beyond the boundaries of the reservation.

Even though we disregard such elementary rule that all reservations in a grant are to be strictly construed against the grantor on the indulgence that no limiting rules apply to Indians, there is still no foundation for any contention that the tribes had a title in fee simple to the submerged lands in question or any contention that there was any reservation or retention of the same, either in the treaty or in the executive order.

Although it is a State court case, we would quote from a decision of the Washington State Supreme Court in reference to the nonexistence of this so-called aboriginal title, as these views of the State court have been accepted over and over again in the Federal courts. The opinion in *State v. Towessnute* (1916) 89 Wash. 478, 154 Pac. 805, at pages 481 and 482 says:

> "The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. From France, from Spain, from Mexico, and from England we have ever proclaimed our title by purchase, by conquest, and by cession, in all of which great transactions the migratory occupant was ignored. Only that title was esteemed which came from white men, and the

rights of these have always been ascribed by the highest authority to lawful discovery of lands, occupied, to be sure, but not owned by any one before. *Johnson v. McIntosh*, 8 Wheat. 543. If in *Worcester v. Georgia*, 6 Pet. 515, the supreme court speaks of the Indians having something which the whites had yet to purchase, it was not title, but mere possessory uses for subsistence. Later cases continue to plant our title on discovery. *Martin v. Waddell*, 16 Pet. 367, 409; *United States v. Rogers*, 4 How. 567, 572.

"The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence. True, arrangements took the form of treaty and of terms like 'cede,' 'relinquish,' 'reserve.' But never were these agreements between equals. Even when we dealt with a 'nation' the Indians were not 'within the description . . . of an independent state or sovereign nation, but of an Indian tribe . . . wards of the nation . . . communities depending on the United States . . . the recognized relation . . . that between a superior and an inferior.' *Choctaw Nation v. United States*, 119 U.S. 1, 27.

"These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes."

"Title to the entire region in question was ceded by the subscribing Indian tribes. To whatever extent they have been underpaid or overreached, that is the problem to be dealt with by the Indian Claims Commission in the proceeding noted as Petitioner's Exhibit 62. That action is being maintained by this petitioner on the theory that it did cede and surrender and relinquish all these properties, but did not receive adequate compensation.

Cowlitz Ind. Tribe v. Tacoma (C.A. 9, 1957) 253 F.2d 625.

The only reservation to which plaintiff can point in the treaty is in Article II of a "present use and occupancy."

United States v. Santa Fe Pac. R. Co. (1941) 314 U.S. 339, 86 L.ed. 260 at page 347 further states concerning so-called "Indian title" as follows:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues. *Buttz v. Northern P. R. Co. supra* (119 US p. 30 Led. 334, 7 S.Ct. 100). As stated by Chief Justice Marshall in *Johnson v. M'Intosh, supra* (8 Wheat. (US) p. 586, 5 Led. 691), 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 US 517, 525, 24 L.ed. 440, 441."

The nonexistence of a so-called aboriginal title is particularly recognized in the following two decisions:

Duwamish Indians v. United States, 79 Ct. Cls. 530 (cert. den. 295 U.S. 755 (1934));

Tee-Hit-Ton Indians v. United States (1955) 348 U.S. 272, 99 L.ed. 314 (on review of 128 Ct. Cls. 82, 120 F.S. 202).

The last cited case at page 279 (99 L.ed. 320) reviews at length the so-called concept of Indian title or aboriginal Indian interest, and in part says:

> "It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

Thus, whatever so-called aboriginal title might exist, it has long since been extinguished by appropriate Congressional authority. The extinguishment occurred in reference to the disposition of the allotted lands or in the disposition of the tidelands which under the enabling act passed to the State. Respondents deraign

their title both under the allotments and under the enabling act.

CONCLUSION

A land title case disposed of upon factual grounds would not seem to warrant review upon a writ of certiorari.

Respectfully submitted

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Feb. 13, 1964